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No. 84-1449

In the Supreme Court of the United States

OCTOBER TERM, 1984

DAVID CERRI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Section 902(g) of the Gun Control Act of 1968, 18 U.S.C. 923(g), which authorizes the Secretary of the Treasury to make warrantless inspections during business hours of any firearms or required records on "the premises (including places of storage)" of a licensed firearms dealer, empowers federal law enforcement authorities to make a warrantless entry into and inspection of a home that is used by a firearms dealer as his place of business.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Donovan v. *Dewey*, 452 U.S. 594	12
Lewis v. *United States*, 385 U.S. 206	5, 10, 12, 13
Payton v. *New York*, 445 U.S. 573	12
Scott v. *United States*, 436 U.S. 128	7
United States v. *Baldwin*, 621 F.2d 251, cert. denied, 450 U.S. 1045	10
United States v. *Biswell*, 406 U.S. 311	4, 6, 8, 9, 11, 12
United States v. *Currier*, 621 F.2d 7	9
United States v. *Davis*, 646 F.2d 1298, cert. denied, 454 U.S. 868	10
United States v. *Miller*, 688 F.2d 652	10
United States v. *Scherer*, 523 F.2d 371, cert. denied, 424 U.S. 911	9
United States v. *Villamonte-Marquez*, 462 U.S. 579	7

Constitution, statutes and regulations:

U.S. Const. Amend. IV	5, 6, 10, 12, 13
Gun Control Act of 1968, § 902(g), 18 U.S.C. 923(g)	4, 5, 6, 7, 9, 12, 13
18 U.S.C. 922	2
18 U.S.C. 922(a)(1)	8
18 U.S.C. 922(b)(2)	2
18 U.S.C. 922(b)(5)	2
18 U.S.C. 923(a)	8
27 C.F.R.:	
Section 178.50	8
Section 178.52	8

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 753 F.2d 61. The opinion of the district court (Pet. App. B1-B5) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1985 (Pet. App. A1). The petition for a writ of certiorari was filed on March 11, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

An indictment returned in the United States District Court for the Northern District of Illinois charged petitioner with 12 counts of firearms sales offenses, in violation of 18 U.S.C. 922. Following a plea of guilty conditioned upon his right to appeal the denial of two pretrial motions, petitioner was convicted on one count of selling a firearm in violation of state law, contrary to 18 U.S.C. 922(b)(2), and one count of failing to record firearms sales information, contrary to 18 U.S.C. 922(b)(5). He was sentenced to a term of imprisonment of one year and one day, to be followed upon his release from confinement by a five-year term of probation. Petitioner was also fined $1000. The court of appeals affirmed (Pet. App. A1-A7).

1. Petitioner is a licensed firearms dealer, with a business address in Norridge, Illinois (Tr. 7, 42, 44, 51). During the late evening hours of November 14, 1981, at a bar in Chicago, petitioner was introduced to Ronald McKenzie, an undercover agent of the Department of the Treasury's Bureau of Alcohol, Tobacco, and Firearms (ATF), by Richard Morales, who had previously bought handguns from petitioner (Tr. 10-11, 44-45, 48). Agent McKenzie told petitioner that he was interested in buying some guns. Following the discussion, petitioner sold Agent McKenzie two pistols for $195 that he had in his car in the bar's parking lot (Tr. 11). Petitioner did not require Agent McKenzie to display a firearm owner's identification card or to complete the registration forms required by federal and state law (Tr. 11-12, 14).

Petitioner told Agent McKenzie that he was a federally-licensed firearms dealer and that, in future

transactions, he would require Agent McKenzie to display a firearms identification card and to complete the necessary forms (Tr. 12, 14-15). However, Agent McKenzie told petitioner that he would refuse to obtain any identification in his own name or to sign any forms (Tr. 13, 53). Agent McKenzie explained that he wanted to ensure that the guns could not be traced to him because he intended to resell them in Missouri where they would be used in the commission of violent crimes (Tr. 13, 50-51, 58). As an alternative, petitioner suggested that Agent McKenzie should use someone else's identification card (Tr. 15). Agent McKenzie, a caucasian, offered to use the identification card belonging to a black male (who was another undercover ATF agent) to purchase any future weapons (Tr. 14-15, 20-21). Petitioner readily agreed to this arrangement (Tr. 16).

One month later, Agent McKenzie informed petitioner that he had acquired the false identification card, and petitioner agreed to sell Agent McKenzie additional firearms (Tr. 16, 18, 53). Although petitioner was not licensed to sell firearms from his home, he invited Agent McKenzie to his apartment and sold him seven .22 caliber pistols that he had at hand for $700 (Tr. 16, 18-20, 22, 26). Upon petitioner's request, Agent McKenzie handed petitioner a firearms identification card (containing a photograph) issued to a black male, the other undercover ATF agent (Tr. 20-21). Using the information found on the card, petitioner completed the necessary federal and state forms (Tr. 21-23). When Agent McKenzie refused to sign the forms himself, petitioner, after practicing the signature, signed the forms in the name of the black male (Tr. 23-25).

The following month, on January 22, 1983, petitioner invited Agent McKenzie to his home to pur-

chase firearms that he had recently received (Tr. 25-26). Upon Agent McKenzie's arrival at 6:00 p.m., petitioner invited Agent McKenzie into his living room (Tr. 56-57). There, petitioner handed Agent McKenzie an invoice listing roughly 40 guns for sale, quoted prices for each one, and showed him some samples (Tr. 26-27, 28-34, 42).[1] Under the pretext of returning to his car to retrieve the purchase money and a list of his customers, Agent McKenzie briefly left petitioner's home (Tr. 34). Before he did, petitioner told Agent McKenzie that he would leave the front door unlocked for the agent's return (Tr. 34). Moments later, Agent McKenzie, accompanied by several other federal officers, reentered petitioner's home (Tr. 35). The agents identified themselves and, without a warrant, searched petitioner's house (Tr. 35, 59-60). In so doing, they seized all of the firearms and business records that they found, but they did not arrest petitioner (Tr. 35-40, 61-62).

2. Prior to entering his conditional guilty plea, petitioner moved to suppress the evidence seized from his home, and, following an evidentiary hearing, the district court denied his motion (Pet. App. B1-B5). Finding that, on the facts of this case, petitioner had "converted his home into his business premises" (Pet. App. B4) and relying upon *United States* v. *Biswell*, 406 U.S. 311 (1972), the court held that the agents' warrantless search of petitioner's apartment was lawful under Section 902(g) of the Gun Control Act of 1968, 18 U.S.C. 923(g). Pet. App. B4. The court also found (*ibid.*) that the search was conducted during "business hours," as required by Section 902 (g), because the search not only had occurred during

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[1] Petitioner also advised Agent McKenzie to obtain another identification card for future transactions, to avoid using the same name too frequently (Tr. 26-27).

the period that petitioner had identified as his business hours in his license application, but also had taken place during the course of an actual transaction. Finally, the court rejected (Pet. App. B4-B5) petitioner's argument that the search was unlawful because it was part of a criminal investigation, on the grounds that the distinction between an inspection and a search was implicitly rejected in *Biswell* and that "a rule allowing federal agents to conduct warrantless searches only until their suspicions were aroused would make little sense" (*id.* at B5).

3. The court of appeals, agreeing with the district court's reasoning, rejected petitioner's Fourth Amendment arguments and affirmed his convictions (Pet. App. A1-A7). As the court explained, while a licensed firearms dealer does not, by that fact alone, forfeit his privacy interests in his home, "a gun dealer cannot escape the net of [18 U.S.C.] 923(g) simply by moving his premises to a place different from the address on his license" (*id.* at A3). Here, by conducting his firearms business out of his home, petitioner had converted his apartment into premises for selling guns, as to which Section 902(g) is applicable (Pet. App. A3). That petitioner had used his home, rather than a storefront, as business premises was immaterial, because "[w]hen used as a place of business, the home has the same status under the Fourth Amendment as any other place of business" (*id.* at A4, citing *Lewis* v. *United States*, 385 U.S. 206, 211 (1966)). The court also rejected as "frivolous" (Pet. App. A4) petitioner's argument that Section 902(g) was inapplicable because the agents suspected him of criminal activity. Finally, the court found it unnecessary to decide what degree of certitude a law enforcement officer must have that a person is using his

home as his business premises for purposes of Section 902(g) because "[Agent] McKenzie knew—he did not merely suspect—that [petitioner] was selling guns from his home * * * with as much certainty as he knew the address on [petitioner's] license" (Pet. App. A5).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Section 902(g) of the Gun Control Act of 1968, 18 U.S.C. 923(g), authorizes federal officials to conduct warrantless inspections "during business hours" of the firearms, ammunition, and required records on "the premises (including places of storage) of any firearms * * * dealer." In *United States* v. *Biswell*, *supra*, the Court upheld this statute against the claim that it authorized a warrantless search of business premises in violation of the Fourth Amendment. As the Court explained in *Biswell* (406 U.S. at 315-317), warrantless inspections of the premises of a licensed firearms dealer are essential to further the "urgent federal interest" in preventing the commission of violent crimes and detecting the origin of particular weapons. At the same time, inspections of this type, the Court held (*id.* at 316), pose only a limited threat to a dealer's legitimate expectations of privacy, because a person who chooses to engage in this pervasively regulated business accepts the prospect that the records, firearms, and ammunition stored on his business premises will be subject to inspection.

The only material differences between *Biswell* and this case, as the court of appeals correctly recognized (Pet. App. A3), are that in *Biswell* federal agents

searched the business premises from which the dealer was licensed to sell firearms, while here federal agents searched a different location that a dealer used to sell firearms and those premises doubled as the dealer's home.[2] However, neither distinction, as the court of appeals held (*id.* at A3-A4), entitles petitioner to evade the purpose underlying the inspection provisions of the Gun Control Act.

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[2] Petitioner contends (Pet. 12-13) that Section 902(g) is inapposite because the agents entered his home to obtain evidence for a criminal prosecution, rather than to conduct an administrative inspection. However, the agents' motives are immaterial in this regard. Whether the agents' entry was unlawful turns on an objective assessment of the facts and circumstances confronting them at the time, not on their motives for entering petitioner's house. *Scott* v. *United States*, 436 U.S. 128, 135-139 (1978). This Court rejected a similar argument in *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983). In that case, the Court held that the possibility that customs officers boarded a vessel because they suspected that it was carrying narcotics did not deprive the officers of their statutory authority to board the vessel to inspect its documents. *Ibid.* For the same reason, the ATF agents' motives for entering petitioner's house in no way vitiate their statutory authority to inspect petitioner's business premises.

Petitioner also argues (Pet. 9-10) that the fact that this search occurred at night enhances the illegality of the agents' entry. But the district court found (Pet. App. B4) that the search occurred at 6:00 p.m. during petitioner's business hours as specified by his license (noon to 8:00 p.m.), and petitioner does not claim that this finding is clearly erroneous. Moreover, as the district court also found (*ibid.*), petitioner was in the process of selling firearms to Agent McKenzie at the time that Agent McKenzie and the other agents entered petitioner's house. Accordingly, the agents clearly entered petitioner's home during his business hours, as Section 902(g) requires.

To begin with, it is indisputable, as both the district court (Pet. App. B4) and the court of appeals (*id.* at A3-A4) recognized, that the "urgent federal interest" (*Biswell*, 406 U.S. at 317) in monitoring the sale of firearms is in no way lessened by the fact that petitioner undertook to sell guns from whatever location he found convenient, including, on at least two occasions, his home. *Biswell* found that the government's interest in regulating the sale of firearms was sufficiently compelling to justify the warrantless inspections authorized by the statute, and it was the nature of the regulated transactions, rather than the locations at which firearms sales take place, that was decisive in that case. Moreover, an essential attribute of the federal firearms control scheme, as *Biswell* makes clear (406 U.S. at 315-316), is that the federal government must be able to conduct warrantless inspections of whatever premises are used in this enterprise to assure that handguns are distributed in a regular, traceable manner, rather than in an indiscriminate fashion that might lead to their undetectable possession by unsuitable customers and their ultimate use in violent crimes.

The Gun Control Act and its implementing regulations recognize this need. The Act makes it unlawful for any person to sell firearms without a license (see 18 U.S.C. 922(a)(1), 923(a)) and authorizes the Secretary of the Treasury to promulgate regulations requiring license applicants to provide such information as he deems appropriate (see 18 U.S.C. 923(a), 926). The implementing regulations require each firearms dealer to obtain a separate license for each different location at which he carries on his business and to notify the appropriate federal officials if he changes his business address. 27 C.F.R. 178.50,

178.52. The court of appeals thus correctly observed (Pet. App. A3-A4) that a firearms dealer may not nullify the statutory inspection scheme simply by moving his place of business from one location to another.

It necessarily follows that petitioner's sale of firearms to Agent McKenzie from locations not identified in his license as his place of business in violation of the governing regulations does not render those premises immune from inspection. As the courts below correctly observed (Pet. App. A4, B4), Congress hardly intended to allow "dealers who were slick enough to establish 'personal collections' for otherwise unlawful sales" (*United States* v. *Currier*, 621 F.2d 7, 9 (1st Cir. 1980)) to conceal infractions of the licensing requirements merely by changing their addresses. See also *United States* v. *Scherer*, 523 F.2d 371, 375 (7th Cir. 1975), cert. denied, 424 U.S. 911 (1976). On the contrary, given the fact that the unauthorized concealment and uncontrolled movement of weapons can seriously endanger the public, Congress intended that the licensing and inspection provisions of the statute would be strictly enforced. Cf. *Biswell*, 406 U.S. at 315-316.

2. Petitioner does not argue that he could have avoided the inspection provisions of the statute by moving his place of business from one store to another. Rather, his argument rests upon the fact that he used his home, rather than a store, as his place of business. But the nature of the location used as a place of business is immaterial to the statutory inspection scheme. Section 902(g) authorizes the warrantless inspection of a firearms dealer's "premises (including places of storage)," and the statute does not limit the places that can serve as a firearms dealer's "premises." The evidence available to Agent

McKenzie clearly showed—and petitioner does not deny—that petitioner not only stored firearms in his home, but also used those premises to conduct firearms sales. Accordingly, because petitioner used his home as his business "premises" for purposes of the Gun Control Act, the agents' warrantless entry into petitioner's house fully complied with the inspection provisions of the statute.

For the same reason, the agents' entry into petitioner's home was consistent with the Fourth Amendment. As the court of appeals noted (Pet. App. A4), it is well settled that a person's home, or any portion thereof, that is used as a business will be treated as one, rather than as a residence, for Fourth Amendment purposes. See *Lewis* v. *United States*, 385 U.S. at 211; *United States* v. *Miller*, 688 F.2d 652, 659 (9th Cir. 1982); *United States* v. *Davis*, 646 F.2d 1298, 1301-1302 (8th Cir.), cert. denied, 454 U.S. 868 (1981); *United States* v. *Baldwin*, 621 F.2d 251, 252-253 (6th Cir. 1980), cert. denied, 450 U.S. 1045 (1981). As the Court explained in *Lewis* (385 U.S. at 211 (citation omitted)):

> Without question, the home is accorded the full range of Fourth Amendment protections. * * * But when, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street.

By voluntarily choosing to use his home as his place of business, petitioner not only accepted the same restrictions that Congress has imposed upon business premises, but also waived the expectation of privacy that he otherwise would have enjoyed in his residence.

That would clearly be the case if petitioner had properly applied for a separate license to use his home as a place of business, as the applicable federal regulations required him to do (see pages 8-9, *supra*). Had he done so, he could not now complain that the ATF agents entered his home without a warrant to examine his stock of handguns and his business records, because neither the Act nor the Court's decision in *Biswell* is limited to ordinary commercial stores.

Petitioner's argument thus necessarily rests upon the premise that he enjoyed a legitimate expectation of privacy in his home because he *unlawfully* used it as his place of business. But it is wholly unreasonable to conclude that petitioner's violation of the federal firearms laws gave rise to a legitimate expectation of privacy that he would not have enjoyed had he instead complied with the licensing requirements. Because petitioner used his home as his place of business and because Agent McKenzie "knew—he did not merely suspect—that [petitioner] was selling guns from his home" (Pet. App. A5), petitioner's expectation of privacy as to that location with respect to his "business records, firearms, and ammunition" (*Biswell*, 406 U.S. at 316) became indistinguishable from that of any other firearms dealer as to his business premises. Moreover, the contrary rule would reward firearms dealers who choose to evade the licensing requirements with immunity from inspection. That result would substantially frustrate Congress' efforts to keep a legitimate watch on the movement of firearms and materially increase the risk that firearms would be sold to unsuitable customers through unlawful channels. Furthermore, given the fact that the decision to enter the firearms trade and to conduct business out of one's home is wholly voluntary, the

decision of the court of appeals does not infringe upon legitimate privacy interests. Accordingly, the courts below correctly held that this Court's decision in *Biswell* is fully applicable where a firearms dealer chooses to use his home, rather than a store, to carry on his trade.[3]

3. Petitioner erroneously claims (Pet. 10-11) that the court of appeals has construed Section 902(g) in a manner that invites "open season" on the homes of federally-licensed firearms dealers. Nothing in the court of appeals' opinion entitles federal agents to conduct warrantless inspections anywhere besides the business premises of federally-licensed firearms dealers. Moreover, such inspections are limited to an examination of the proprietor's "business records, firearms, and ammunition" (*Biswell*, 406 U.S. at 316). The court of appeals also expressly acknowledged (Pet. App. A5) that the warrantless search of a home violates the Fourth Amendment, even if the search is otherwise reasonable. In this case, the court of appeals simply refused to allow petitioner to evade the firearms inspection scheme that this Court had upheld in *Biswell* simply by moving his place of business from a commercial store into his home. However, because the Fourth Amendment does not forbid a

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[3] Petitioner's claim (Pet. iii, 7) that the court of appeals' holding conflicts with *Payton* v. *New York*, 445 U.S. 573 (1980), is thus without merit. While *Payton* held that law enforcement officers must obtain an arrest or search warrant before entering a person's private dwelling to search the premises, *Payton* did not involve the situation, present here, in which a person, by his own design, has converted his home into a place of business, which is governed by different Fourth Amendment standards (see *Donovan* v. *Dewey*, 452 U.S. 594, 598-599 (1981); *Lewis* v. *United States*, *supra*). Accordingly, *Payton* is inapposite.

person from using his home as a business or forbid law enforcement officers from taking into account the manner in which a person, in fact, uses his home (*Lewis* v. *United States*, *supra*), the courts below correctly held that the agents' search was consistent with the Section 902(g) of the Gun Control Act and the Fourth Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10228